**IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH**

*Criminal Appeal No.303-SB of 1994*
*Date of Decision: July 06, 2007*

Joginder Pal

...Appellant

**VERSUS**

State of Punjab

...Respondent

*Criminal Appeal No.363-SB of 1994*
*Date of Decision: July 06, 2007*

Parveen Kumar

...Appellant

**VERSUS**

State of Punjab

...Respondent

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

**Present:** Ms.Tanu Bedi, Advocate,
for the appellants.

Mr.M.C.Berry, Senior DAG, Punjab,
for the State.

*RANJIT SINGH, J.*

This order will dispose of Criminal Appeals No.303-SB of 1994 (Joginder Pal v. State of Punjab) and 363-SB of 1994 (Parveen Kumar v. State of Punjab) arising out of common judgment.

Joginder Pal and Parveen Kumar have filed above-noted two appeals impugning their conviction under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter called "the NDPS Act") and the award of sentence of ten years rigorous imprisonment coupled with fine of Rs.one lac to each of the appellant.

The appellant, Joginder Pal, had a shop at Mahilpur on Phagwara road, where appellant Parveen Kumar was working as a Compounder. The shop had displayed a board advertising that medicine for de-addiction of opium and poppy-husk was available and the public can utilise the services etc. On 23.3.1992, ASI Parveen Kumar of Police Station, Mahilpur, District Hoshiarpur alongwith HC Prem Lal and some other police officials, while on patrol duty in the area, were present at Subzi Mandi, Mahilpur. ASI Parveen Kumar received a secret information against the appellants, whereupon he joined Ashok Kumar and Jit Ram, besides associating SI Banarsi Dass of Intelligence Wing to raid the shop. During the raid, Parveen Kumar appellant was found present at the shop. Six packets wrapped in a glazed paper were recovered from the right drawer of the table and these were found containing some powder. Each packet, on weighment, was found to contain 400 grams of powder and these were taken in possession after preparing a

recovery memo, which was attested by Ashok Kumar and Jit Ram P.Ws. Appellant Parveen Kumar was given an option if he desired to be searched before a Gazetted Officer or before a Magistrate as these packets were suspected to be containing some contraband material. It appears that the offer is after recovery. Appellant Parveen Kumar is alleged to have reposed confidence in the police, whereupon each packet was separately sealed with the seal bearing impression “PK”. The seal, after use, was handed over to witness Ashok Kumar. It is alleged that ruqa, Exh.PD, was sent to police station for registration of a case and a formal report, Exh.PD/1, was recorded by Charan Singh ASI. Case set up is that appellant Parveen Kumar alongwith the case property was produced before SHO/SI Harbans Singh at new Bus Stop, Mahilpur. SHO Harbans Singh broke open the seals put on the packets and took 100 grams from each packet as a sample. The remaining packets and the sample were also separately sealed by the SHO with his seal bearing impression “HS” and were again taken into possession vide memo Ex.PE. This was prepared by SHO. Appellant Parveen Kumar and the samples were again handed over to ASI Parveen Kumar. The case property with the seal was deposited with MHC Ashwani Kumar. ASI Parveen Kumar also prepared a rough site plan. Appellant Joginder Pal, who statedly owned 5/6 shops in the city, however, was granted anticipatory bail. The case, after investigation, led to prosecution of both the appellants leading to their conviction and sentenced, as afore-mentioned.

In support of its case, prosecution examined seven prosecution witnesses in addition to tendering report of Chemical

Examiner. The appellants, when confronted with incriminating evidence and the material, pleaded their false implication and denied all the allegations levelled by the prosecution. Appellant Joginder Pal further brought out that he is falsely implicated in this case at the instance of his landlord, who wanted him to be evicted from the shop forcibly with the help of police. In his statement before the court, he further brought out that ASI had been threatening him either to give him money as a bribe or to face an illegal action. As per appellant Joginder Pal, this fact he has mentioned in the anticipatory bail application filed before Sessions Judge, Hoshiarpur even before the occurrence. Relying upon the report of Chemical Examiner, which found that the contents of the exhibits contained diacetylmorphine heroin and the other prosecution evidence, the prosecution succeeded in securing conviction of the appellants leading to the award of the sentences.

The learned counsel appearing for the appellants has attacked the findings of conviction recorded on number of grounds. The counsel pleads false implication of the appellants due to landlord-tenant dispute, wherein the landlord was wanting appellant Joginder Pal to be evicted from the shop forcibly with the help of police. The counsel would also find fault with the conduct of the prosecution in not examining three persons, who had been joined as independent witnesses during the recovery of the contraband. It is further claimed that the mandatory requirement of Section 42 of the NDPS Act was not complied with. A serious grouse is made about the fact that the seal of the contraband, after recovery, which was put by the police official was broken and re-sealed after taking sample,

which, according to the counsel, would cast a serious doubt on the prosecution case in regard to the powder recovered as such or if it is the same which was recovered from the shop. It is further pointed out that the entire case is based on the solitary testimony of ASI Parveen Kumar (PW-7) and the case does not find any support from any other independent witness. It is accordingly pleaded that it would be unsafe to maintain the conviction of the appellants solely on the basis of testimony of police witness, who otherwise has not conducted himself with credit. Plea in regard to violation of the provisions of Section 55 of the NDPS Act is also raised and it is accordingly pleaded that the appeals be allowed and the appellants be set free and relieved of the consequences of the trial and punishment.

I have heard the counsel for the parties.

Concededly, the recovery was effected by ASI Parveen Kumar on the basis of a secret information received by him. At the time of raiding the shop, he had joined Ashok Kumar and Jit Ram alongwith SI Banarsi Dass of Intelligence. Appellant Joginder Pal was not present at the time of recovery and only Parveen Kumar appellant was arrested from the shop. The packets were also not recovered from the person or possession of appellant Parveen Kumar, but were found lying in the drawer of the table wrapped in a glazed paper. PW-7 then produced this case property before SHO Harbans Singh (PW-4), who opened the seals of the packets produced before him. After taking sample, PW-4 re-sealed the packets with his own seal. Even if this exercise was done in the presence of independent witnesses present at the time of recovery of the packets from the shop, it would lose its significance as they

were not examined during the trial. The seal put by PW-7 on the packets was re-opened and another seal by SHO was put thereon. On the face of these facts, it was the duty of the prosecution to prove to the satisfaction of the judicial conscious that the packets, which were recovered from the shop, were the same which were produced before the SHO and re-sealed. This assurance could have come if the independent witnesses, like Ashok Kumar, Jit Ram and SI Banarsi Dass of Intelligence, who were joined during the search, had been produced by the prosecution. In the absence of their examination, a doubt may arise if the contraband recovered is the same, which in fact was produced before PW-4 and re-sealed by him. PW-7 has handed over his seal to independent witness, which is of no consideration considering the later developments.

It may also require notice that these packets were produced before PW-4 while he was present at the bus stand and not in the police station. He chose to break open the seals put on the packets at the bus stand itself and drew samples weighing 100 grams each of the six packets. He appears to have weighed the remaining contents also, which, according to him was 300 grams in each packet. Though PW-4 claims that this exercise was done in the presence of Ashok Kumar and Jit Ram and the seal after use was handed over to Ashok Kumar, but this aspect of the case has remained un-substantiated in view of non-examination of these witnesses. From the cross-examination of PW-4, it revealed that the bus stand is located at a distance of a quarter kilometer from the shop from where the powder was recovered and that police station fell in route from shop to the bus stand. How PW-7 knew about the

presence of PW-4 at the bus stand and could reach him instead of going to the police station has also not been explained. Normal practice is to call the senior officer to the spot. Why PW-4 could not be called if PW-7 knew that he was present at bus stand is not explained in any manner.

The counsel for the appellants is not un-justified in submitting that except for the evidence of ASI Parveen Kumar (PW-7), prosecution has nothing else to show in support of its case. The counsel would further be justified in saying that it would be rather unsafe to place an implicit reliance on the version of PW-7 in the background of plea of false implication raised by the appellants, which according to the counsel, is receiving substantial support from the evidence and material on record.

The plea in regard to compliance of the provisions of Section 42 of the NDPS Act can also not be easily ignored. PW-7 had conducted this raid on the basis of a secret information received by him while he was on a patrol duty. The evidence of PW-7 would show that he could lay his hands on these six packets lying wrapped in a glazed paper, which, according to the witness, contained some powder. It is not the case of prosecution that this witness found this to be an objectionable contraband attracting the provisions of NDPS Act. The witness has not offered any justification as to how he picked up these six packets of powder assuming these to be containing some contraband. It is to be noted that it is a shop of doctor and other packets lying there could be expected. The allegation well can be made against him that this all was pre-planned with the aim to get the shop vacated from appellant Joginder Pal. Except for his version

that he had sealed these packets with his seal bearing impression "PK" which he handed over to Ashok Kumar, there is no other material produced in evidence in this regard. Putting of the seal on the packets and handing over of the seal to Ashok Kumar would lose its significance and importance as this was subsequently broken open by PW-4. Nothing is made clear as to what happened to the seal, which was handed over to Ashok Kumar. Ashok Kumar has also not come forward to say that he kept this seal with him till they met PW-4 at bus stand. The prosecution, as such, has not been able to rule out the possibility of tampering of this material between the time of its recovery and till it was deposited in the police station.

The manner in which the samples have been drawn at a bus stand would leave much to be desired. PW-7 did not draw any sample from this contraband at the time of recovery of the same at the shop. There is no person (except PW-7) to give independent account of the fact that the powder, which was recovered from the shop, was the same which was taken and produced before PW-4 and that the samples were drawn therefrom. Strangely, it is noticed that PW-7 had given an option to appellant Parveen Kumar for being searched in the presence of a Gazetted Officer, which, according to the witness, the appellant had declined. No evidence is given to show that PW-4 had done this exercise in the presence of appellant Parveen Kumar. There is no record that the samples were drawn in the presence of appellant Parveen Kumar. This will lead to another doubt being cast on the case of prosecution. In fact, the aspect of option is also not fully established on record. The attention of PW-7 was drawn to the ruqa in which, according to the witness, the giving

of the option was recorded. The perusal of the ruqa showed that it was not found so recorded in Exh.PD. As per PW-7, he had recorded so in the recovery memo, Exh.PE. When the attention of the witness was drawn to this exhibit, this fact was also not found mentioned therein. Even in report given under Section 173 Cr.P.C., the option having been given to appellant Parveen Kumar for search etc. was not found mentioned.

PW-7 otherwise denied knowledge about the fact that appellant Joginder Pal had made allegation against him in his anticipatory bail application filed even before the incident. He, however, conceded that appellant Joginder Pal had taken this shop from Sat Pal on rent. To link, appellant Joginder Pal, the prosecution was to prove that he was running the shop. This appears to be a reason for PW-7 to so state as otherwise he did have any material before him to depose like this. PW-7 neither recorded the statement of Sat Pal nor took into possession any rent note. This also seems to be with purpose to avoid the allegation of his being a party to seek vacation of the shop from appellant Joginder Pal at the instance of Sat Pal. Witness otherwise denied the suggestion of the defence that this false case was registered against appellant Joginder Pal at the instance of Sat Pal. In the background as afore-mentioned, the trial court was not justified in ignoring the plea raised by the appellants that case was not supported by evidence of any independent witness. No reasons are forthcoming as to why three independent witnesses, joined during search/raid, were left out. It is not being stated that they were won over. One of them was police officer working in the Intelligence Wing. It is, thus, seen that the case of

prosecution is supported only by the version of PW-7, who is a police officer. Serious chinks could be noticed in his version during his cross-examination. He was found to have mentioned certain facts, which he could not substantiate from the record prepared by him. He could not justify his assertion that offer was given to one of the appellants for being searched before a Gazetted Officer or a Magistrate, as the same was not found reflected in the ruqa or the recovery memo as claimed by him. This fact was not even found mentioned in the challan. This fact may not be vital as not a requirement under law but would show the demeanor of witness to assess his worth. This fact would further need appreciation in the background of the allegation made by appellant Joginder Pal of his false implication to help the landlord in evicting him from the shop. This fact cannot be said to be an afterthought as it was so reflected by appellant Joginder Pal in an application moved by him seeking bail at the very first instance and even before the registration of the case.

The submission made by the counsel for the appellants that case may reveal violation of the provisions of Section 42 of the NDPS Act also appears justified. Section 41(1) of the Act empowers Magistrate to issue warrant for arrest or search in respect of offences punishable under Chapter IV of the Act. Likewise, only empowered officers or duly authorised officers as enumerated in Sections 41(2) and 42(1) can act under this provision of the NDPS Act. Under Section 41(2) only the empowered officer can give the authorisation to his subordinate officer to carry out the arrest of a person or search as mentioned therein. If there is a contravention that would

affect the prosecution case and vitiate conviction. Under Section 42 (1) the empowered officer having prior information given by any person has necessarily to take down the same in writing. He, however, may carry out the arrest or search without warrants where he has reason to believe from personal knowledge that offences under Chapter IV have been committed or materials which may furnish evidence of commission of such offences are concealed in any building etc. In such event, section does not mandate that he should record his reasons of belief. He ofcourse has to take down in writing in case he has a prior information as noticed in ***State of Punjab v. Balbir Singh, AIR 1994 SC 1872.*** The object of the NDPS Act is to make stringent provisions for control and regulation of operations relating to those drugs and substances. At the same time, it is also aimed at avoiding harm to the innocent persons and to avoid abuse of the provisions of the Act by the officer. Certain safeguards are provided, which are required to be strictly observed. It is in this context, the Hon'ble Supreme Court observed that these provisions make it obligatory that such of those officers mentioned therein, on receiving an information, should reduce the same to writing and also record reasons for the belief while carrying out arrest or search as provided under the proviso to Section 42(1). To that extent, they are mandatory and consequently the failure to comply with these requirements affects the prosecution case and, therefore, vitiates the trial. Similarly in ***Abdul Rashid Ibrahim Mansuri v. State of Gujarat, (2000) 2 SCC 513,*** non-compliance of the requirements of Section 42(1) to take down in writing the information received and to

send the copy thereof to immediate superior officer was considered vital resulting in causing prejudice to the accused. This was a case where the information was received by the Inspector from a constable that a particular person was trying to transport charas to a specified place in an autorickshaw bearing the specified number. This information received by the Inspector was stated to be falling within the purview of Section 42(1) and the requirement of taking down this information in writing received from the Constable and sending a copy thereof to his immediate superior officer, was held applicable and this having not been done, it was found that the provisions of Section 42 of the Act were not complied with. The submission made for applying different approach to the non-compliance of Section 42 was not accepted by the Supreme Court. It was held as under:-

> "If the officer has reason to believe from personal knowledge or prior information received from any person that any narcotic drug or psychotropic substance (in respect of which an offence has been committed) is kept or concealed in any building, conveyance or enclosed place, it is imperative that the officer should take it down in writing and he shall forthwith send a copy thereof to his immediate official superior. The action of the officer, who claims to have exercised it on the strength of such unrecorded information, would become suspect, though the trial may not vitiate on that score alone. Nonetheless the resultant position would be one of causing prejudice to the accused."

Accordingly, non-compliance of this provision may not itself be enough to vitiate the trial, but this would certainly make the action of PW-7 suspect and would result in a prejudice to the case of the appellants. The procedural safeguards should always be considered in the context of the sweep of the powers. It is said that wider the power, the greater the need for the restraint in its exercise and correspondingly, more liberal the construction of the procedural safeguards envisaged by the Statute. (See ***Ranjit Thakur v. Union of India and others, AIR 1987 SC 2386).*** Frankfurter, J. in Vitarelli v. Seaton, 359 US 535 has very aptly observed ".....This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword." He further said "the history of liberty" has largely been the history of observance of procedural safeguards." Thus, it can be said that the non-compliance of the provisions of Section 42 (1) cannot be easily ignored and the benefit of prejudice accruing therefrom must be given to the accused persons. In ***State of West Bengal and others v. Babu Chakraborty, AIR 2004 SC 4324,*** it was held that great significance has been attached to the mandatory nature of the provisions, keeping in mind the stringent punishment prescribed in the Act. This court has attached great importance to the recording of information and the ground of belief since that would be the earliest version what would be available to a court of law and the accused while defending his prosecution. This court also held that failure to comply with Section 42(1), proviso to Section 42(1) and

Section 42(2) would render the entire prosecution case suspect and cause prejudice to the accused. Reference in this regard can also be made to ***Koluttumottil Razak v. State of Kerala, (2000) 4 SCC 465 and Beckodan Abdul Rahman v. State of Kerala, (2002) 4 SCC 229.***

Since the prosecution has not provided any sufficient and cogent reasons for leaving out the independent witnesses making the case to rest on the solitary testimony of police witness (PW-7), whose evidence cannot be considered above board, it would be unsafe to maintain the conviction of the appellants. In ***Gurcharan Singh v. State of Punjab, 2005(4) RCR (Criminal) 681,*** one of the reasons given by the court while acquitting the appellant in this case was that no explanation was forthcoming as to why a public witness to search and seizure was given up. Similarly, in the case of ***Narain v. State of Haryana, 1997(1) RCR (Criminal) 414,*** the prosecution case was doubted on the ground that occurrence took place on a crowded railway platform where several independent persons were available, but only one railway employee was included in the raiding party, who turned hostile. It was held that prosecution failed to make proper compliance of the procedure to establish the charge. Here in this case, though the independent witnesses were statedly joined, but have not been examined casting serious doubt on the case of prosecution. No reasons are disclosed as to why these independent witnesses were not examined by the prosecution. It cannot be ignored that one of the witness was a police official belonging to Intelligence Wing and no justifiable reasons can be advanced not to

produce this witness in support of the case of prosecution.

In my view, the prosecution has not been able to prove its case beyond reasonable doubt and having regard to the nature of prosecution evidence, it is unsafe to convict the appellants for a serious offence under NDPS Act. In view of sealing and re-sealing of the contraband, the doubt can creep in regard to the authenticity of the seal and even the material recovered. In a criminal trial to base a conviction, all possible doubts arising from the evidence must be resolved to the satisfaction of the conscious of the court and if there remains any doubt, which is reasonable, the benefit of that must accrue to the defence.

Keeping the totality of the evidence of the prosecution and the material on record, I am of the considered opinion that the prosecution has failed to establish the charge against the appellants beyond reasonable doubt. Giving benefit of doubt, the appellants earn their acquittal.

Both the appeals are accordingly allowed. The conviction and sentence awarded to the appellants are set-aside. The bail bonds and surety bonds, if any, furnished in the trial court, shall stand discharged.

July 06, 2007 ( RANJIT SINGH )
ramesh JUDGE